UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

ALLEN JOHNSON, ET AL.,	:	Docket No. 16-cv-1543
Plaintiffs,	:	
vs.	:	March 10, 2021
CHESAPEAKE LOUISIANA LP, ET AL.,	:	
Defendants.	:	

REPORTER'S OFFICIAL TRANSCRIPT OF THE MOTION HEARING
VIA ZOOM BEFORE THE HONORABLE S. MAURICE HICKS, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:
ANDREW D. MARTIN
Davidson Summers
330 Marshall St., Ste. 1114
Shreveport, LA 71101

FOR THE DEFENDANTS:
NICOLE M. DUARTE
Jones Walker
811 Main St., Ste. 2900
Houston, TX 77002

REPORTED BY:
LARAE E. BOURQUE, RMR, CRR
Federal Official Court Reporter
800 Lafayette Street, Ste. 3103
Lafayette, LA 70501

P R O C E E D I N G S

THE COURT: Quick good morning to everybody.

We're here for the oral arguments in a motion to reconsider the Court's previous ruling on partial summary judgment motions.

We've got a number of people who are present with us on this Zoom video teleconference proceeding. And I'm not going to go through a roll call of all of the attorneys who may be joining us by Zoom today. There are only eight of you that -- or seven of you that I can see that are actually using their video portion. And we have a court reporter present. The rest of everyone looks like they've either been muted -- let's see. Randy Davidson is unmuted, and that's one of the problem areas that I think has been corrected.

All right. I'm not going to go down that list because we'll be here the rest of the morning just going through the list of attendees that was previously submitted, and from the Court's viewpoint, the only people that are speaking today for the plaintiffs will be Drew Martin, and for the defendants, that will be Nicole -- is it Duarte or Duarte?

MS. DUARTE: Duarte.

THE COURT: Duarte. Close, but no cigar.

MS. DUARTE: Thanks, Your Honor.

THE COURT: All right, then. Is everybody ready to proceed?

MR. MARTIN: Yes, Your Honor, we're ready.

MS. DUARTE: Yes, Your Honor.

THE COURT: All right. I'm going to try this again.

Ms. Duarte? Close enough?

MS. DUARTE: Perfect.

THE COURT: All right. You have the floor at this point, and if you'd go ahead and begin, and 20 minutes as an initial deal is fine, but I'm intending for this to be argued down. So I don't want interruption by the other attorneys during your argument, but if it takes 30 minutes, it takes 30 minutes. If it takes 40, it's 40.

I will let you know that I will use Judge Don Walter's rule of Scheherazade. For as long as you entertain me, you may speak. When you cease to entertain me, it's off with your screen.

So let's go ahead and get started on this as the movant.

MS. DUARTE: As long as it's not off with my head and just off with my screen, I can live with that ruling, Your Honor.

THE COURT: I changed the rule.

MS. DUARTE: All right. Thank you so much.

My name is Nicole Duarte. I'm here today on behalf of Chesapeake. And I know that the Court has heard from these parties and other parties in the related *Self* action on the same issues. So what I've tried to do is not start from the

beginning, but to read through particularly the Court's discussion in the *Self* transcript, the *Self* argument transcript, and try to focus my presentation today on the specific questions and issues that the Court raised in that transcript.

So what I have is a PowerPoint. It's not fancy, it doesn't have any cool graphics, but what it tries to do is simply outline Chesapeake's position and give you directly quotations from the cases and the text of the statute that support the position we're advocating today.

THE COURT: And the Court will require that that PowerPoint be emailed to chambers, and when it's emailed to chambers, since it's actually a demonstrative aid for my purposes in going back over your argument, please send a copy to plaintiffs as well.

MS. DUARTE: Of course.

THE COURT: And you may just do a blast email saying here's my PowerPoint. That way I have something to refer back to in summary form as opposed to the brief.

And we do have some new legal theories that were not present in the first go-round, so to speak, in the *Self* case. So we have some new things to consider and reconsider in this particular context.

So you have the floor again.

Thank you.

MS. DUARTE: Understood.

And if I could share screen, please.

MS. GUILHAS: You've got the ability.

MS. DUARTE: All right. I'm trying to find it. I'm not getting the icon for it.

MS. GUILHAS: Down at the bottom.

MS. DUARTE: Share screen. There we go.

Okay. Everybody can see that?

THE COURT: Yes.

MS. DUARTE: All right. Excellent.

So I'd like to start off just with an articulation of what Chesapeake's position is in the action because, as you said, Your Honor, this has been refined a little bit over the course of the case.

The conclusion that we're asking this Court to adopt is that Louisiana Civil Code Article 2297 provides for the right of reimbursement of post-production costs incurred by Chesapeake to market plaintiffs' gas. That is the source of the reimbursement that we're advocating and asking the Court to adopt.

So in terms of the rationale for this that I'm going to go through today, I've broken it down into three parts, and the colors are there so that the slides are easy to relate back to which argument we're talking about at the time or which part of the rationale.

So first is the principle that it's settled law in Louisiana that Section 10(A)(3) creates a quasi-contractual

relationship of negotiorum gestio. This is done by operation of law when a unit operator sells a UMO's gas. And what I'm going to focus on in that argument or that section of the argument is the aspect of a quasi-contractual relationship.

I know that in the *Self* hearing, the Court expressed concern over the extent to which the prescription cases can be imported into this case to talk about what the right of reimbursement is, are they just one-off cases or is it something bigger.

And what I want to show the Court during this portion of the argument is that what we're talking about is a relationship. It's a quasi-contractual relationship established that imports the provisions of the Civil Code relating to negotiorum gestio into a quasi-contractual relationship, a contract with specific provisions and obligations for the parties.

From there, I want to talk about the second part, which is that Article 2297's reimbursement right is an express codal term of the quasi-contractual relationship, and this goes to the concern that the Court expressed in the *Self* hearing about gap filling and equity and having to disregard express statutory law in favor of equity.

And what I want to establish during that portion of the argument is we're not talking about equity. We're not talking about gap filling. What we're talking about is an express

statutory codal provision that provides for a right of reimbursement.

And then the last section that I want to address is the issue of conflict. Given that we have 10(A)(3) and we have Article 2297, another expression of positive law, is there a conflict between those two provisions such that the phrase, quote, proceeds of the sales of production, trumps Civil Code Article 2297's reimbursement right.

And under that are three kind of sub-rationales:

The first thing is the Court's duty to harmonize and reconcile the acts, if possible, to avoid a conflict. That's a fundamental and -- I'll show the Court -- primary rule of statutory interpretation. That applies even absent a finding of ambiguity. So you don't have to find that it's ambiguous to have to apply that rule. That rule is something that's in the first analysis, and it's very, very important in this case, because it's your duty to try to find a peace between Civil Code Article 2297 and 10(A)(3).

The second portion is that "proceeds" simply means cash and doesn't speak to the issue of post-production costs at all. This is also something that I think the Court addressed, if not directly, then indirectly, in the *Self* argument saying that "proceeds" means proceeds. It doesn't say "net." It doesn't say "gross." It just means what you get from the sale. In our view, what you get from the sale simply means cash as opposed to the

kind of in-kind balancing that is ordinarily applicable to working interests.

The last part of the argument relates to even if the Court is going to read the term "proceeds" to mean gross specifically, that doesn't by itself -- that doesn't expressly exclude the application of this reimbursement right. Nor does it relieve the UMO of other obligations that can be set off against that amount.

And the big item here is severance taxes. And I will suggest to the Court now, and I'll go into this in more detail in a minute, severance taxes is the roadblock, I think, in this case. The way severance taxes operate are the same way that the right of reimbursement under 2297 operates. And I don't know how, given the way that severance taxes operate and the concession of all parties that they are allowed to be withheld from the proceeds of the sale by the operator, why the necessary and useful expenses can't similarly be withheld by the operator.

So that is the order of presentation, and I'll just jump right in.

The first thing we're going to talk about -- or I'm going to talk about -- is the settled law that there is a quasi-contractual relationship of negotiorum gestio created between the unit operator and the UMO when the operator sells production, and this is something that happens by operation of law, which is important, and we'll talk about that in just a

second.

So I started out here with the Louisiana Supreme Court authority on this issue. And for some reason this doesn't always appear in all the briefing in any of the cases, and I'm not sure why that case doesn't -- and it doesn't appear in Judge Foote's decision in the *J&L* case. She says the Supreme Court hasn't spoken on it. Actually it has and here's where it's spoken on it.

In the *Wells vs. Zadeck* decision in 2012, you'll see the bolded sentence right here, "A quasi-contractual relationship is created between the unit operator and the unleased mineral interest owner with whom the operator has not entered into contract." And, again, after that, the Court uses the term "relationship" again.

And in that decision the Court is relying on two different cases for its discussion of this Louisiana jurisprudence on unleased mineral interest, the *Taylor vs. Smith* case and then the *King vs. Strohe* case.

In *Taylor vs. Woodpecker*, the Court again -- the Supreme Court again talked about the relationship authorized by the statute between an unleased interest owner and a unit operator. In that case the Court didn't specifically talk about quasi-contractual or negotiorum gestor, but it is still talking about a relationship, which is something that goes beyond just prescription, that goes beyond just saying that the nature of

this cause of action for prescription purposes only is this. This is a relationship in the words of the Supreme Court.

So now we look at the *Taylor vs. Smith* case, which is the one that the Supreme Court relied upon in *Wells vs. Zadeck*. And this case has a very long and good explanation of the exact nature of the relationship that's created by 10(A)(3) and how that fits into the Civil Code generally.

So the Court starts off talking about where there is no written agreement, 10(A)(3) has supplied the terms of the contract. Okay? And that's what the law is doing in this case. It's creating a relationship by operation of law and it's supplying the terms of the contract; not just 10(A)(3), but once 10(A)(3) creates a relationship of negotiorum gestio, then the negotiorum gestio also create -- I'm sorry. Are you speaking, Your Honor? You're on mute. Oh, I'm sorry.

Okay. I'm sorry. I was confused.

THE COURT: I have my law clerk with me on this. I'm in my conference room. So if I start yakking, (a), either I'm talking to you and I'm muted, or, (b), I'm not talking to you and I'm muted. In this case I can just go off video and mute, but I'm still listening because that's the only way I can communicate in Zoom with my law clerk.

MS. DUARTE: I apologize. I wasn't trying to interrupt. I just assumed --

THE COURT: We have rules of how we do this. I'm still

messing around with this platform. And that's why we have Jeanne Guilhas with us who is essentially our network engineer for all things Zoom. I'm still learning what things mean and the icons and stuff on the screen, but Jeanne will tell me that I'm muted when I'm not supposed to be.

I'm sorry. Go ahead.

MS. DUARTE: No. I apologize.

Okay. So back to where I was talking about *Taylor vs. Smith* and supplying the terms of the contract. That's the first relevant point.

In the second quote, the Court is talking about an obligation of the unit operator imposed without agreement, but instead by sole authority of the laws. So here we have a recognition that a law can create a relationship, right? It can create obligations beyond contract.

And if you look at Article -- Civil Code Article 1757, which was cited by the Court in *Taylor v. Smith*, it's talking about obligations arising directly from the law, and it specifically mentions management of the affairs of another as one of those instances. So, again, we're talking about a quasi-contractual relationship imposed by operation of law, by positive law.

So, again, the Court talks about quasi-contract, and it specifically identifies the nature of that quasi-contractual relationship as negotiorum gestio, right? "The operator, in

selling the owner's proportionate share of the oil produced, is acting as a negotiorum gestor or manager of the owner's business in selling the oil produced."

The last point is that Article 2295, now 2292, sets forth the quasi-contract which results from the transaction of another's business. Again, we're talking about creating something for all purposes, not just prescription.

King vs. Strohe is the other case cited by the Supreme Court in *Wells vs. Zadeck*, and in that case, again, you'll see this highlighted language, "Quasi-contractual relationship." I won't belabor that.

We have other cases as well since then that have recognized this.

Taylor vs. Woodpecker. This is the First Circuit now. The previous case, the *Taylor* case, was the Third Circuit. "The unit operator acts as negotiorum gestor."

Hackett. "The law has settled on the proposition that the landowner's -- the unleased landowner's cause of action is quasi-contractual."

And then *J&L vs. BHP* in which Judge Foote of the Western District has adopted these positions and says that the Third Circuit has said that we're in quasi-contract, and, again, this is based upon negotiorum gestio.

So these cases are not limited simply to the prescription context in which they were decided. That was the

issue except for the *J&L Family* case. And they're not limited to that for a couple of reasons:

One, as I've indicated, the courts are talking about relationships. They're talking about a relationship and a contract, a quasi-contract, that's created by law and by the voluntary act of being a unit operator and selling production. Those relationships have incidence that go well beyond prescription.

And, second, when doing that prescription analysis, the courts aren't simply analogizing. They're not just saying, well, we don't know what the prescriptive period is here. So it's sort of like this kind of action, so we're going to pick that one. What they're saying is we're tasked with determining the nature of the cause of action, right, the nature of the cause of action as the Court said in *Smith*. So, again, that is something that's much more fundamental than simply analogizing to some law to say that prescription applies.

And you can see this from the *J&L* decision of Judge Foote. In that case the Court was looking to the quasi-contractual provisions of the Civil Code to figure out whether attorney's fees are authorized under 10(A)(3)). Attorney's fees aren't mentioned in 10(A)(3), right, but the Court's recognizing in that case that the incidence of a quasi-contractual relationship goes beyond necessarily what's in 10(A)(3), right? We're going to go look at the Civil Code

provisions generally on negotiorum gestio to find whether or not attorney's fees are authorized.

Now, one other point I wanted to raise is that it's not just the cases that talk about this kind of a relationship that can be created with these kind of more far-reaching consequences.

So if we look at 30:10 itself, and 30:10(A)(2) for this portion, there is an explicit recognition in that statute that this kind of a relationship can be created. And here this is 10(A)(2)(b)(ii)(dd). And the Court is talking -- or the statute is talking about the obligation of the unit owner to pay royalty and overriding royalty to nonparticipating owners while the drilling and production costs are being recouped, right? During that recoupment period, the unit owner is still supposed to be paying the royalty and overriding royalty amounts to the nonparticipating owners so that they can pay their royalty owners.

And what the statute says is, "Except as provided in this paragraph, the drilling owner's obligation to pay the royalty and the overriding royalty to the nonparticipating owner in no way creates an obligation, duty, or relationship between the drilling owner and any person to whom the nonparticipating owner is liable to, contractually or otherwise."

And I think what this provision is saying is we're recognizing that a court might find basically a third-party, beneficiary-type relationship could be created by this duty that

we're imposing on the unit owner to pay the amounts or the royalties, and the statute is saying, no, that doesn't happen.

So I think this is relevant for two reasons: One is the fact that it shows that such a relationship is envisioned, and, two, that there's exclusionary language that can prevent it, right, that the legislature knows how to do that when it wants to.

We don't have that kind of exclusionary language on negotiorum gestio in 10(A)(3). We don't have anything like that, but here above in the same statute the legislature saw fit to try to exclude a relationship it knew could be created.

So that's the first portion, which is basically what we have is our quasi-contractual relationship of negotiorum gestio.

The second portion is that now we have an express positive law outside of 10(A)(3) that gives a right of reimbursement for post-production costs, and that is Civil Code Article 2297. "The owner whose affair has been managed is bound to fulfill the obligations that the manager has undertaken as a prudent administrator and to reimburse the manager for all necessary and useful expenses."

So, again, here we're talking about positive law. We're not talking about gap filling. We're not talking about equity. We're talking about express statutory law. And it's a situation in which the Civil Code is supplying this provision as a term of the quasi-contract that is created by the operator's

sale of minerals under 10(A)(3).

So that leaves us two different statutory provisions, two potentially competing statutory provisions. One is 10(A)(3) and one is Civil Code Article 2297.

I've reproduced the text of 10(A)(3) here, but what we're focusing on, I believe, is the bolded language, "The proceeds of the sale of production." "The operator shall pay to such party or such parties such tract's pro rata share of the proceeds of the sale of production within one hundred eighty days of such sale."

So now let's talk about whether there is a conflict between those two provisions.

Now, I think the first issue to address, because this is something that the Court talked about extensively in the *Self* transcript, which is the rules of statutory construction that apply in this case. And I believe that the word that the Court used, what's threshold, what's not threshold; what is only dependent upon ambiguity, you know, what allows this to look at things only when Your Honor has determined that an ambiguity already exists; and what do we look at on the front end as our threshold or what I'm going to call primary matter.

So what I'd like to point the Court to is Civil Code Article 13. "Laws on the same subject matter must be interpreted in reference to each other."

And if we look at what the Supreme Court has said about

that provision, it says that when statutes seem to conflict, this article makes it this Court's duty to harmonize and reconcile the acts if possible. This is huge because this duty to harmonize is on the front end, and it's before the rule that says specific applies over general. You don't get to specific applies over general until you find a conflict, and you don't get to a conflict until you've undertaken this duty to harmonize the acts if possible. This is a primary rule of statutory --

THE COURT: Stop if you would. Go back to your slide on 30:10. I want to be sure that I understand how this exception, except in this paragraph -- I'm sorry. Keep going. Go to your next slide.

Okay. It's back. I'm sorry.

MS. DUARTE: That's okay. I'm working on learning all of these buttons, too.

THE COURT: Yeah. Boy, isn't that the truth.

MS. DUARTE: I had my son come over last night to try to make sure I didn't turn myself into a cat.

THE COURT: You've got to have somebody younger. That's true. Twelve-year-olds pick this right up.

Look at the one in green. Is that the one that we're looking at just above -- no.

MS. DUARTE: So the green one sets out 2297. The next one is the language.

THE COURT: Let's see. It is concerning your second

point, the need to harmonize.

MS. DUARTE: Okay. The harmonizing?

THE COURT: It's the one after that because it talks about...

MS. DUARTE: Okay. The two slides that I have on harmonizing are this one that I just talked about, and then -- whoops -- then the following one where I was going to talk about the Court's language showing that it was primary.

THE COURT: We've just gone to our enormous TV screen, and it is the one in your list at the very top on the left margin in red.

Yeah. That's the one.

I'm going to go off screen because I need to look at the entirety of the provision here. So I'm going to hide the video panel.

But I guess the issue for me, you claim that it may establish a legal relationship by operation of law, and this one says, "Except as provided in this paragraph, the drilling owner's obligation to pay the royalty and overriding royalty to the nonparticipating owner..."

Is a nonparticipating owner in the same class as an unleased mineral owner? Are those fungible terms?

MS. DUARTE: For this particular provision?

THE COURT: Yes.

Let's talk about generally in the oil and gas industry.

Are those fungible terms or is there a difference between an owner who has leased property becoming an overriding royalty, okay, or is what I call an NPO and a UMO part of the same class?

MS. DUARTE: Well, NPOs, as you're using that term -- and UMOs are not interchangeable because you can have a nonparticipating owner who is leased who just decided not to participate or they could be nonparticipating because they were never notified.

THE COURT: Okay.

MS. DUARTE: I think those are the two situations that 10(A)(2) envisions having a nonparticipating owner.

THE COURT: All right. And then it says, "In no way creates an obligation, duty, or relationship."

You're using the express language of the statute saying in no way creates an obligation, duty, or relationship to say that it contemplates a relationship.

MS. DUARTE: Yes.

THE COURT: Is that your point?

MS. DUARTE: That's the first part of it.

THE COURT: And then your argument is that if the legislature can exclude operation of law relationships in 10(A)(2), they could have done this in 10(A)(3)), but didn't?

MS. DUARTE: That's part of it, yes. I mean, I think that 10(A)(2) shows a recognition that absent some sort of

exclusion like this, just giving someone a duty under a statute could have bigger implications. It could create a relationship that has other associated duties and obligations, like in this case, a third-party beneficiary. And I think it shows that the legislature, when it recognizes that possibility exists, can specifically exclude that in the statute so everybody knows, hey, we're going to make you pay this, but we're not going to import all of that other stuff. So, yes. That's exactly what I'm arguing from this provision.

THE COURT: Sorry. I did not mean to interrupt the flow of which you were presenting, but I couldn't resolve in my mind what you were actually using that provision for. I get it now. I'm sorry. Can you go back to your regular slide?

MS. DUARTE: This is your meeting and I'm happy to answer any questions you have at any stage, Your Honor, of course.

We were, after this, going to the harmony, the duty to harmonize, right? And so we talked about Civil Code Article 13. We talked about *Walker* and the Supreme Court's interpretation of that.

What I wanted to make the point of in the next slide was the primary nature of that rule of statutory construction because I know that Your Honor talked about, well, do I not get to that, or multiple other rules.

THE COURT: And that's one of the concerns I have.

The Mineral Code in our state is rather unique because it's the primary source of all things oil and gas, is it not?

MS. DUARTE: Well, are we talking about the Mineral Code proper because 30:10(A)(3) is not part of the Mineral Code proper.

THE COURT: Right.

So we've got the Mineral Code which is primary as to all things. Now we're in Title 30 and now we're in Civil Code.

So I hate to say this, but this is gap filling as to in what order do you take this and which source is primary for consideration and which source has become primary because of a failure to speak in the Mineral Code or other statutes. That's the rub as far as I'm concerned.

MS. DUARTE: And I would respectfully disagree in terms of the gap filling nature.

So when you're in the Mineral Code proper, the Mineral Code proper has Article 2, and it says this is the Mineral Code, and in the event of a conflict, the Mineral Code prevails over the Civil Code or other statutory law, but there has to be a conflict. And it also specifically says when the Mineral Code doesn't speak to it, the provisions of the Civil Code govern. Okay?

So there's an express rule in the Mineral Code to resolve this issue and to tell you when it's primary or really when it trumps, right, when it's going to override something in

the Civil Code, and that's only when it's spoken to the issue and that's only when it's spoken to the issue in a way that conflicts with the Civil Code.

So we're not in the Mineral Code proper. So 10(A)(3) isn't subject to that rule I don't believe. I haven't seen anything that says it is.

THE COURT: That's one of my concerns in this as to which provision or provisions control in this circumstance.

So we're on track. I get where you're coming from. I just wanted to tell you that's one of my concerns that you do need to address.

MS. DUARTE: And that's -- I got that from the *Self* transcript as well, and that's what I'm trying to do, I guess, with this provision.

Now, I will tell you this: When you go and you read kind of any Louisiana Supreme Court case that deals with statutory interpretation, it's a potpourri of stuff, right? They will sometimes use ambiguity in front of a rule. They will sometimes not use ambiguity in front of a rule, a particular rule of statutory construction.

But this citation here, this quotation that I have, is the best example that I could find where the Court actually tried to reason it out and tried to delineate what are the primary rules and what are the secondary rules. And that term, "secondary rules," is the Supreme Court's right here in this

quote.

And so if you leave this quote in and you look at it, it's saying, "When a law is clear and unambiguous and its application doesn't lead to absurd consequences, it shall be applied as written, with no further interpretation made in search of the legislature intent."

Okay. Primary rule. We're starting there.

"The starting point for interpretation of any statute is the language of the statute itself. Additionally, all laws pertaining to the same subject matter must be interpreted in pari materia, or in reference to each other." Civil Code Article 13 which I just showed you.

Now we're departing from primary rules of statutory interpretation. We're going to secondary. "When, on the other hand, a statute is not clear and unambiguous, or its application leads to absurd consequences, we rely on secondary rules of statutory interpretation to discern the meaning of the statute at issue. In such cases, the statute must be interpreted as having the meaning that best conforms to the purpose of the law." And I forget if that's Civil Code -- let's see. It might be 11. Ten. That's ten. And then, "Moreover, when the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur and the text of the law as a whole," and that's Civil Code Article 12.

So the way that the Court divides it up in this case is

to put that in pari materia. It must harmonize the rule as a primary rule of interpretation. It's something you have to deal with whether or not you find the language in the statute is ambiguous. It's something you have to deal with along with applying the law as written along with not leading to absurd consequences.

And that's -- I hope that answers the Court's question for purposes of how we deal with a non Mineral Code statute like 10(A)(3) and Civil Code Article 2297 when someone is arguing that there's a conflict between those.

THE COURT: It certainly helps in terms of the analytical framework of the argument.

MS. DUARTE: Okay. Great.

So our position is that we're looking at the words, right, we're looking at the absurd consequences, but at the same time we're looking at 2297, another enactment of positive law, and we're harmonizing if possible. Only if we cannot harmonize those two do we get to the rule that if there's a conflict, the more specific prevails over the general, and we don't think we get there. We believe that it is entirely possible to harmonize these two statutes, just as we do in the context of severance taxes, and find a way that they live together.

Okay. So now moving to apply that whole kind of statutory construction interpretation analysis. Here's what we see in 10(A)(3). Really here's what we don't see.

10(A)(3) doesn't expressly exclude a right of reimbursement of necessary and useful expenses under 2297. It doesn't say anything like that. It doesn't state expressly that the UMO is entitled to the payments of the proceeds of the sale, you know, without deduction for any post-production costs. No language like that. It doesn't expressly exclude the creation of a negotiorum gestio relationship like that provision of 10(A)(2) did for third-party beneficiaries.

And really 10(A)(3) doesn't even say "gross." A lot of the analysis to date has kind of assumed that that's what it means or that's what it potentially means. It doesn't say that. It just says, "Proceeds of the sale of production." So that's what we're working with now, and what we're trying to determine is, given all of those things not being there, does 10(A)(3) really absolutely necessarily conflict with 2297's right of reimbursement.

THE COURT: Oh, let me ask you one other thing.

When you -- your slides are numbered over in the margin, but they're not numbered themselves. If you could transfer the numbers that are shown in my far left margin here to the actual slide itself, it would really help us seeing something as large as we can see it on the screen as opposed to having to really squint with a magnifying glass up there. That's just a little technical issue.

MS. DUARTE: And I apologize. I actually have the

notes enabled, so it covered up. There's a teeny-tiny little page number down there. I know it's really teeny tiny in the right-hand corner. Let me put it on -- you know what? Let's do this.

THE COURT: That's all right. It just helps in terms of us being able to know which slide to go back to.

MS. DUARTE: Understood.

And if that needs to be bigger, I can absolutely do that.

THE COURT: Okay. It will just help us after the arguments have been concluded today.

MS. DUARTE: Okay. Of course.

So we're talking about what the statute doesn't say. It doesn't have any express language in 10(A)(3) that would say 2297 doesn't apply, negotiorum gestio doesn't apply, none of that.

What we also know is that silence isn't enough, right? It's not enough -- if the statute doesn't even actually address it, that's not enough to create a conflict. That's not enough to displace other potentially applicable provisions of the Civil Code.

And I've cited the *J&L* case again here, which is the case Judge Foote decided regarding attorney's fees. Even though 10(A)(3) doesn't expressly mention attorney's fees, the Court looks to those quasi-contractual Civil Code articles to see if

there was a right for attorney's fees provided for there. This is because the terms of this quasi-contractual relationship can come from outside 10(A)(3) once that statute has created this negotiorum gestio relationship by operation of law.

Now, it is our position that 10(A)(3) is silent on the issue of post-production costs for UMOs, and it's silent because the phrase "proceeds of the sale of production" really just means in cash, right? It really just means the money you get from the sale as opposed to the kind of in-kind balancing that is preferred for other working interest owners.

I've cited this *Hunt Oil v. Bachelor* case. This is the one where the Supreme Court's talking about the preference for in-kind partition for general working interest owners, and the Court distinguishes here UMOs in this footnote. And it says, "We note that the legislature has statutorily resolved the gas imbalance issue where an unleased owner is involved." And it quotes 10(A)(3) and the Court italicizes "proceeds," right, because it's using "proceeds" there just to distinguish proceeds as cash from the in-kind partition. And you'll see this is in more detail in the next slide.

So other courts have simply used that term "proceeds" to contrast with in-kind balancing, and these courts aren't referencing gross versus net. They're not referencing the ability of the unit operator to charge for post-production costs. All they're doing is saying, hey, proceeds is different from

production in kind.

You can see this very clearly in the *Amoco v. Thompson* case. The Court says, "It is significant that this statute defines the owner as the person who has the right to the production and not just the proceeds from the sale of production." It's the exact language here, right? It's the exact language of 10(A)(3)), and it's just saying it's different from production. "The pertinent statutes, when read in pari materia, refer to the owner's right to a share of the production, not the proceeds of the sale of production."

THE COURT: "In kind" is, gee, I'd like to take wellhead gas and make use out of it in the volume that I would be entitled to?

MS. DUARTE: Yes, Your Honor. It's taking it in kind. It's saying, I'm going to market my own gas. You don't sale it for me. I'm going to take it as gas, not as cash, after you've gone and sold it for me.

THE COURT: And is an unleased mineral owner entitled to take in kind or are they restricted to proceeds?

MS. DUARTE: They are entitled to take in kind. And that appears from -- let's see if I can find it. Going back to the text of 10(A)(3)). "For which the party or parties entitled to market production therefrom have not made arrangements to separately dispose of the share of such production attributable to such tract."

So that shows right there that only when they haven't taken it in kind, when the UMO hasn't taken it in kind, does the unit operator have the power to sell it and remit the proceeds instead of the product, the production.

THE COURT: Thank you.

MS. DUARTE: Okay. So I went through *Amoco v. Thompson* using it in that same production versus proceeds of sale of production. You see something similar in the *King vs. Strohe* case.

In all of these, the emphasis is the courts, right? In this case the Court is saying -- let's see. "The trade-off for this statutory authorization is that it creates an obligation in which the unit operator is required to pay the parties entitled to market production their pro rata share of the proceeds of the sale within 180 days. The statute affords greater protection to unleased owners than is enjoyed by mineral lessees. When all mineral interests in the unit are leased, the lessees are merely entitled to a pro rata share of production from the unit. This share can be delivered in cash or in kind, but lessees are only entitled to share in the cash proceeds of the sale of production in certain situations." So, again, the Court is using the term "proceeds of the sale of production" or "proceeds just in cash" just to show that it's not production.

And I will say this: This is similar to something that Your Honor said as well in the *Self* transcript. And I'm looking

at page 40 of the transcript. And you said, "But that's the real gut case that I have, is how is 'proceeds' ambiguous? 'Proceeds' means 'proceeds,' neither net nor gross. It just means 'that which you received at the time it was sold.' And it's easy to find that." And that's lines 13 through 16 on page 40.

And again on page 42 on line 7, you're talking about proceeds, "that which I got from a sale." That's exactly what we're saying here. "Proceeds" is that which you got from a sale, money, cash. It's not speaking to whether it's net or gross or the amount of that that you're entitled to, but simply the fact that it is cash.

And what I also wanted to point out is you see that it's not just in the cases. If we go up to 10(A)(2) -- 10(A)(3) isn't the only time in 30:10 that the term "proceeds" is used. The term "proceeds" also appears in 10(A)(2)(b)(iii), or however you say that. "A participating owner shall deliver to the owner whom has not been notified the proceeds attributable to his royalty and overriding royalty burdens as described in this section."

Again, this is what we're talking about when the drilling and production costs are being recouped before payout as allowed under the statute. The unit owner still has to remit the amounts to pay the royalty owners and overriding royalty owners.

And the Court -- or the statute uses the term "proceeds" here, too, but in this case "proceeds" doesn't speak

to gross or net, right? It says, "Proceeds attributable to his royalty and overriding royalty burdens." To know whether it's gross or net, you would have to actually look at the royalties or the overriding royalties to see if they were cost-free or not. "Proceeds" just means cash. It just means out of what you've sold, you've got to remit whatever amount is attributable to the royalty and overriding royalty burdens now. And that's consistent with what we're talking about, what we're articulating here. "10(A)(3) proceeds" also just means cash. This is consistent with what the Court seemed to be playing with in that *Self* transcript quote I just gave you.

Okay. So moving to the next step now.

Let's say you don't agree. Let's say the Court doesn't believe that "proceeds" just means cash and the Court gives it a meaning of gross. Even in that context, it is our position that the 2297 right of reimbursement applies. This is because 10(A)(3) doesn't relieve the UMO owner of other obligations that can be applied against the amount received, right? Even if you get gross, there still may be other things that set it off against that, and these other things may come from places other than 10(A)(3) itself.

How do we know this?

Severance taxes. And if I could like put fireworks shooting out of this thing, if I knew how to do that, I would put them on this slide, and I didn't ask my son to do that, but

severance taxes are the roadblock, right?

If we look at 47:635(2)(C), it says, "The unit operator shall collect or withhold out of the value of the product severed the proportionate parts of the total tax due by the responsible owners." And this applies to the UMO along with any other owner under 47:632.

Now, plaintiffs have conceded -- I'm sorry?

THE COURT: That's statutorily provided for.

MS. DUARTE: Just like 2297.

THE COURT: They're different in a different category. They may be a post-production cost. Severance taxes are actually a production cost.

MS. DUARTE: Well, I will quote, Your Honor, from *J. Fleet*, right?

And in this case, "Post-production costs are those costs and expenses incurred after the production has been discovered and delivered to the surface of the earth. Such subsequent to production costs generally include those related to taxes, transportation, processing, dehydration, treating, compression, gathering," and Your Honor was basing that on *Babin*.

THE COURT: Until it's severed, there is no production. You've got to pull it out of the ground --

MS. DUARTE: Right.

THE COURT: -- in order for taxes to apply because you don't tax reservoirs.

MS. DUARTE: Exactly, which is why it's a post-production cost.

THE COURT: All right. That's clear.

Thank you.

MS. DUARTE: Okay. So that being the case, in this case the plaintiffs have conceded that they owed these severance taxes and that the unit operator is authorized to withhold them from its payment of proceeds to the UMO despite the express language of 10(A)(3).

All right. So we've gone to the next slide.

And my point here is simply that there's no logical explanation for why severance taxes could be deducted from gross proceeds, but the post-production costs that constitute necessary and useful expenses under Civil Code Article 2297 can't similarly be set off against it.

THE COURT: The severance taxes are provided for by specific statute. Other components of post-production costs don't enjoy statutorily-required deductions after production of natural gas.

MS. DUARTE: Article 2297 is just as much a positive enactment of law as the severance tax provision.

THE COURT: I disagree with you. I can read "shall withhold" or "shall or withhold" very clearly, but I don't see an equivalent for transportation costs in unleased mineral owners. I mean, that's a specific statutory required deduction after

production for everybody, whether you're a unitized, you know, pulled in by a commissions unit or whether you're a mineral lessor. Severance taxes are paid because the state is going to take its share out of what you remove underground.

Now, show me where there is a statutory authorization of this specificity for post-production costs involving transportation costs for an unleased mineral owner.

MS. DUARTE: Article 2297 uses "bound" language, which is the same thing as "shall." It says, "The owner whose affair has been managed is bound to reimburse the manager for all necessary and useful expenses." So if we're going to expect at this stage that post-production costs are such necessary and useful expenses, then 2297 is just as emphatic.

Now, I think the Court is going to -- or it sounds to me like the Court is going to specific versus general, right, and that's a rule of construction when you have a conflict.

THE COURT: Right.

MS. DUARTE: But only when you have a conflict.

And I would suggest that the severance tax statute is not more specific than 10(A)(3). 10(A)(3) governs UMOs, and it governs UMOs only in the situation in which their gas is sold by a unit operator. The severance tax statute applies not just to the minerals. It applies to anything that's been severed from the ground or water, okay, trees, take your pick, lots of other stuff, and it's not applying just to UMO owners, right? It's

applying to anybody.

So that statute, I believe, is in exactly the same position as 2297. It has mandatory language that is owed. It applies to a broader group of people in a broader group of circumstances. So even if you got to the general versus specific, the severance tax statute is not more specific than 10(A)(3). So I think from an analytical standpoint, there is no difference between the severance tax provision and the way that it applies and Article 2297 and the way that it applies.

THE COURT: Then you concede that 10(A)(3) is unambiguous?

MS. DUARTE: That is our position.

I think you get to the same place if you find that it is ambiguous. Our position is that it's unambiguous. It just means cash with respect to proceeds of the sale of production. It doesn't speak to the issue of gross versus net.

But I'm playing devil's advocate here, and I'm saying even if we go with the unambiguous means gross, then we still get to the same place because we've got this duty to harmonize. We've got another equally valid, equally situated, in terms of stature, provision that we've got to harmonize with 10(A)(3)), that this is how you do it for severance taxes. It's the same way for 2297.

And I guess I would add to that that this negotiorum gestio right has existed since the code of 1870. So it's not

something new, right? It's been around for a long time before 10(A)(3) came along, before 30:10 came along, and the legislature's presumed to know about it.

And I would also point out that this is an independent obligation like the severance tax obligation owed by the UMO, and it can be set off against the right to gross proceeds under the Doctrine of Compensation, which is Civil Code Article 1983, and that takes place by operation of law when two persons owe each other sums of money.

So, again, just like severance taxes, there's nothing inconsistent here about giving the UMO the right to gross proceeds, if that's the way you construe the statute, and still imposing upon it a separate obligation to reimburse the operator for expenses.

Now, this is kind of the grand finale part, and here what I want to point out to the Court and what I want to try to convey is that our interpretation is the only one that harmonizes the two statutes, the only one that avoids a conflict, right? And it's also consistent with how both parties agree that the severance taxes operate.

In addition to that, being consistent with those rules of statutory interpretation, that primary rule that you must harmonize, if you can, Chesapeake's interpretation is consistent with the fact that like all working interest owners, UMOs are required to pay their share of the cost of development and

operation of a well, right? And it's also consistent with the fact that other similarly-situated parties are required to pay their share of expenses to share in the profit. And in this case I'm talking about mandataries, co-owners, good faith possessors. This is that kind of undercurrent of unjust enrichment that permeates the Civil Code, right?

In almost any case where someone is managing someone else's interest, other than a bad faith possessor, you're going to get your costs of management, your necessary and useful expenses. And I think that mandate is even the most interesting one of these and here's why.

Louisiana recognizes passive mandate in addition to express mandate, and a passive mandate is basically just when the person whose stuff is being managed actually knows about it, but doesn't do anything, that can give rise to a tacit mandate, and when you have that tacit mandate, the mandate articles provide that the mandatary gets his expenses of management.

So in this case we have negotiorum gestor, which doesn't matter whether you know or not that your property is being managed. It's a fine line between that and the tacit mandate relationship. Yet the original opinion holds that unleased mineral owners are different from the tacit mandate situation, right, functionally, that they don't get it -- the operator doesn't get it in the negotiorum gestio context, but it does get it as to where we would end up if it's an actual

mandate.

So the point is that there is an absurdity, we believe, in construing the statute 10(A)(3) in a way that distinguishes the UMO so strongly from this giant history of reimbursement for expenses that you see everywhere else in the code.

Now, the plaintiffs' interpretation, in contrast, creates this conflict where we don't believe any needs to exist. This violates this harmonizing rule of statutory interpretation. It also treats post-production costs inconsistently with the way severance taxes are handled.

And plaintiffs' interpretation makes these UMOs the only people in Louisiana, besides bad faith -- besides people in the bad faith possession context, to get this kind of a free ride with respect to the expenses of managing the thing from which the profit is derived.

This is another issue that the Court talked about in its ruling in the *Self* transcript, and it's the last one that I want to address.

There is no reason to treat UMOs differently in the specific context of post-production costs. That's our argument.

Courts have identified two instances in which the UMOs do get right of protection. They're not subject to a risk fee. They're entitled to this in-cash balancing instead of this in kind.

If we look at what the Fifth Circuit has talked about

in this *TDX Energy* case, we see that it's not enough to just say that because unleased mineral owners get protection in some situations, they should be entitled to that protection in all situations. You need to speciate it a little more. It's appropriate to look at why do they get protection in these contexts and does that reasoning apply in the particular situation you're looking at.

So in *TDX*, it was actually a situation where the Court was considering whether the information statute, 30:103.1 and 2, applies to all unleased owners, only ones who are totally unleased, or those who are not leased to the operator, right?

And in doing that, the Court talked about, "The district court thought that the legislature may well have intended to provide greater protections for landowners who typically are not as sophisticated as, or have the available resources of, individuals or entities that procure mineral leases. Title 30 does provide some extra protection to completely unleased owners. They are not subject to a risk charge. That makes sense, as an unsophisticated owner may lack resources to contribute to drilling costs up front, but there is no apparent reason to treat lessees differently when it comes to reports." Right?

The Court is looking to the specific issue, the reporting, and deciding do UMO owners have special protections here or not.

Now, in this case they're doing that to say that there's no special protection, so we're going to give the lessees the benefit of this provision, but it's the same analysis that we believe the Court needs to conduct here, right?

If we're going to talk about it's absurd for the legislature to offer this additional protection to UMOs, this basically free ride with respect to post-production costs, we need to look at that specifically in order to -- we need to look at the nature of the right, the nature of the free ride. It doesn't make any sense for UMOs to be treated differently in this context, right?

The necessary and useful expenses reimbursement right isn't dependent upon the sophistication of the person whose affairs are being managed, right? It applies to everybody. Anyone that could be managed, this right applies.

So the fact that these UMO owners are protected from the risk fee, are protected for the in cash because they don't have the ability to market their own gas necessarily, doesn't translate to the context of post-production costs.

THE COURT: Let me ask you one question: Is there any instance in -- let's use fracking, for instance, with the spidering and draining of gas from a unit area authorized by the Commissioner of Conservation. Under those circumstances, is it possible for an unleased mineral owner to say I don't want to be in the unit and you can't get natural gas from that horizon under

my property?

MS. DUARTE: Well, I would assume the intention -- and this is how I think it would work -- that the unleased mineral owner, like anybody else, could contest the establishment of the unit during that procedure, and if there's not special exception made and the unit is established by the Commissioner, they're in like everybody else.

THE COURT: Right.

And they're forced into it. And so the free ride, they're automatically -- and no lease bonus was paid. They don't negotiate a royalty, whether it's one-eighth, 25 percent, whatever. The Haynesville Shale changed a lot of that.

So they're in because of the Commissioner's order unitizing production from defined properties in the unit. They don't have any say in anything except with respect to the assessment of costs or the -- I'm going to use this word advisedly -- wrongful, you know, quote, end quote, assessment of costs.

So their obligations are substantially less than a mineral lessor's obligations and their rights are quite different because they're not defined by the lease agreement and/or operation of law. They're just defined in their relationship with the operator of the well essentially by default. There is no contract. That's why it has to be quasi-contract because some sort of relationship exists because the operator owes money, but

it is a default relationship over which they have no control.

MS. DUARTE: Well, I'm not sure I understand the default part of it because it's not default. It's by operation of law, which is one of the ways, under Civil Code Article 1757 or seventeen something seven that I cited earlier, is a source, right, of obligations. So it is an express contract provided by law.

You are correct to the extent that they do not negotiate it, right, that they -- but that doesn't mean that they're in a worse position necessarily in terms of post-production costs. There's an upside and a downside. It's a risk that you don't know going in. They are -- an unleased mineral owner doesn't have to participate in the drilling costs or anything like that on the front end, right? They don't have to put up any money. So they can sit there and wait, and if production doesn't -- if the well doesn't pay out, they never pay in. So there's no risk from that. Even if the well does pay out, they don't have to pay a risk charge from sitting it out. So they get to wait for that whole process. They have rights to information along the way for the pre-production costs that have consequences if that isn't complied with, and those kinds of claims are made in this case as well. They're totally distinct from this, but they're made. So they have those rights.

They have a preference over the other working interest owners in that they get in-cash balancing if they want. Now,

they can still take it in kind, right? So they can do their own thing if they're sophisticated and they want to do it, but if they don't, they get cash. Nobody else gets that unless some special situation applies. So it's not all against them, right? They are brought in by force just like others are brought in by force even if they're leased. You know, you can get stuck with Operator X that's not your lessee. There are a lot of forced aspects of it that are not unique to the UMO.

And the whole force regime is, of course, designed to prevent waste, right? It's not to just try to stick it to people like the UMOs. It's to try to have a meaningful way to develop the resources of the state and ensure that everybody gets their just and equitable share.

THE COURT: So I guess the question I'm asking you is: Are unleased mineral owners, vis-a-vis the operator of the well, in an inferior position to those who have leased their land to the original mineral lessor?

MS. DUARTE: No.

In some manners they are in a preferential position like the in cash versus in kind, and economically you can't tell until the end of that process who's in a better position, who made a better bet by leasing or not leasing. It depends upon the provisions of the lease, and it depends upon the payout of the well.

It may be that somebody in the end who decides not to

lease makes more money with that working interest that they get paid on once the well pays out as opposed to having leased for certain terms. It's absolutely not a situation in which the UMO always comes out less than the leased party.

THE COURT: All right. Thank you.

MS. DUARTE: Unless the Court has any other questions, that's the end of my presentation.

THE COURT: I don't have any questions, but I do want to take a ten-minute break before we hear from Drew Martin.

And thank you for a very well put together presentation that really illustrates very clearly the issues here and your argument that's contained in your brief.

MS. DUARTE: Thank you, Your Honor.

THE COURT: We'll be in recess until about 11:20, and at that time we'll hear the response or rebuttal argument of Mr. Martin on this on behalf of the plaintiffs.

Thank you.

(RECESS)

THE COURT: All right. We're back on the record.

Is everybody that needs to be present on Zoom there?

MR. MARTIN: Yes, Your Honor.

THE COURT: All right. Let's see.

Drew Martin.

MR. MARTIN: Yes, Your Honor.

THE COURT: I'm going to put you heads-up on my screen

so that I can clearly see you and you'll be ready to go.

MR. MARTIN: Yes, sir.

I'm going to share the screen here real quick, get my PowerPoint up and running.

THE COURT: I need you to send it to my chambers afterwards.

MR. MARTIN: Yes, Your Honor.

Can everyone hear me okay?

THE COURT: The Court can.

MR. MARTIN: Thank you, Your Honor.

Good morning.

I'm sure the Court's tired of hearing us reiterate our position over and over again in these related matters, but I'm going to jump in and do it one more time for the Court, weigh out what our argument actually is. It's pretty simple. It's that the enactment of 30:10 in 1984 and went into effect in 1985 created an obligation that did not previously exist. For the first time an operator was obligated to pay one class of owners within a unit their prorated share of the proceeds of the sale of production.

The next step of this argument is that this Court's institutional function is to construe the nature of that obligation, figure out what its content is rather than trying to determine what the content should be.

Opposing counsel mentioned that she does not think

there's any logical explanation for how the legislature elected to deal with this. That's a policy argument that should be addressed with the legislature.

The next step is the ordinary public meaning of the words of Section (A)(3) are what we give effect to in construing the content of the obligation.

And then, finally, proceeds of sale has an unambiguous ordinary public meaning. It means the entire amounts.

You'll see the many cases we've cited to that effect, that the unmodified form of those phrases refers to everything. The *Phillips Petroleum*, the *Garland v. Roy* case. This is both in the oil and gas context, outside of the oil and gas context, within the Fifth Circuit and across the country.

"Proceeds" means proceeds. It really is that simple as you put it in the *Self* hearing.

So that's our position, and I really do think that's the end of the story. That's, I think, what this Court determined in March of 2019 when the Court ruled that it need not reach any of Chesapeake's many arguments because the legislature provided a solution to this exact question exactly where it looks like it did. The law is what it appears to be. And this is not an elaborate, postmodern prank played by the legislature to hide the ball, intentional obscurity. That's not what's going on.

So I don't think we need to go further than the statute that is the only statute in Louisiana that directly addresses

what an unleased owner is to be paid, but because I'm opposing Chesapeake's motion, I do feel obligated to at least give an overview of their arguments.

So what is Chesapeake's position?

Now, opposing counsel primarily detailed gestio law, which is what I've got listed first, and there is no question that that appears to now play an important role in their suite of arguments at this point, but when you look at what's still on the table in this reconsideration, that's just the tip of the iceberg.

They've also argued unjust enrichment, mandate. Chesapeake has argued that the co-ownership theory gives them the result they want.

They've made a number of equity and policy arguments, some of which opposing counsel touched on.

They've argued legislative intent, and this is an interesting one because Chesapeake took the bold step of trying to enlarge the summary judgment record after the fact on reconsideration in adding in evidence it claimed was evidence of legislative intent, and that was a big part of the motion for reconsideration addressed in the reply. It seemed to be kind of central to answering the question to Chesapeake and yet opposing counsel didn't even mention it in her oral argument. It shrunk in importance all of a sudden.

Chesapeake has argued that Section (A)(3) is only about

timing about when an unleased owner is to be paid. Chesapeake has argued that industry custom gives them the result they'd like.

Chesapeake has argued that post-production expenses are operating costs and that post-production expenses are not operating costs.

Chesapeake has argued that the plain language of Section (A)(3) produces an absurd result and that it does not.

Chesapeake has argued that the statute is ambiguous, and Chesapeake has argued that the statute is unambiguous, back to back pages in fact.

And then opposing counsel -- and I'm glad she did this -- brought up a third way, what I'd call the agnostic position, which is that it doesn't matter if the statute is unambiguous. The rules of gestor -- every rule of gestor applies if not expressly excluded within 30:10. And I'm glad she brought that up because it does kind of summarize Chesapeake's entire flexible approach to statutory interpretation. It doesn't matter what the statute says.

I would contrast this with *BPX's* original argument in the *Self* matter, which there were certainly many problems with an ambiguity argument, but *BPX* at least seemed to concede that if the statute had said "gross proceeds," that would have been enough to knock out those production expenses. Chesapeake's position is, no, it doesn't matter what Section (A)(3) says.

There's no way to knock out post-production expenses except presumably a statement that Article 2297 of the Civil Code, which is not referenced anywhere else in the unitization statute, still does not apply in this context. That appears to be the only thing that would satisfy Chesapeake at this point.

And I would note that *BPX* appears to have updated its position after the *Self* hearing to something akin to this argument perhaps when they realized there were some problems with the ambiguity argument, but I'm just using it to contrast what Chesapeake is saying with what at least *BPX* used to say.

Now, this is a lot of arguments, and it's kind of -- Chesapeake's arguments here are kind of like Walt Whitman. They contain multitudes, right, and you could spend a lot of time trying to parse out how these play into each other.

How does gestio law interact with ambiguity interact with absurdity? Which of these are compatible or incompatible? Which of these are independent justifications or dependent ones?

We could spend a lot of time doing that.

We played whack-a-mole in briefing a lot and I think we've done a fair job at knocking out each argument on its own, but this Court was faced with many of these arguments at the original summary judgment stage and I think made the correct determination that you don't need to wade into that swamp of arguments and try to figure out how they fit in with each other unless you're willing to step away from the only statute in

Louisiana that addresses payment to an unleased owner.

And when you look at a set of arguments this wide, it's hard not to come away with feeling that Chesapeake's treating this with a bit of cynicism. Chesapeake is arguing the statute is ambiguous and unambiguous and it doesn't matter, but what they're really doing is they're winking and nodding and saying, Your Honor, please give us the result we want by any means you find acceptable. And that's fine. Chesapeake's lawyers' job is to come up with arguments that deliver the result their client wants, and they have elected here, as a strategic matter, to take the shotgun blast approach, to take the everything thrown at the wall and see what sticks approach, and that's their tactical prerogative. I'm not criticizing that, but what that should tell you is that this is just about the result.

There's no theoretical consistency here because theoretical consistency is not the point. The point is to backwards engineer a rationalization for a practice that began over a decade ago before these arguments were dreamed up. This was not the prospective justification. As this Court recognized on summary judgment, you don't need to go there. You do not need to step away from the statute which appears to address this exact question.

And I'd turn now to what I think is kind of an elephant in the room when it comes to gestio theory, which is the centerpiece for opposing counsel's argument today.

As I was going through all the briefing in this matter and the related matters in preparation for this hearing, a statement jumped out at me from the amicus brief filed by LABI, and you see the same statement in, I think, the 12(b)(6) motion in the related class action. Both of these documents were authored by current counsel for Chesapeake, Ms. Duarte.

And in it she says that for the past 25 years, it has been settled in Louisiana that this is negotiorum gestio. It's quasi-contractual in nature based upon the doctrine of negotiorum gestio set forth in Civil Code Articles 2292, et seq. However, this Court's ruling does not mention this settled body of state law establishing Section (A)(3)'s quasi-contractual negotiorum gestio foundation. The bold is in the original. The message is shouted. It's how did you miss this, Your Honor? This isn't just the correct answer. This is settled law. This is obvious. But that statement looks pretty curious when you look at the timeline of this case.

This suit was filed in October of 2016. I know this because I drafted the petition. Chesapeake removed it to this Court shortly thereafter and then filed a motion for summary judgment in February of 2018. Chesapeake then filed a reply memorandum in support of that MSJ in March. Then we all got together on May 8th of 2018, and Mr. Summers from my firm argued for plaintiffs and Mr. Ottinger for Chesapeake. And in this time period many, many arguments were advanced by

Chesapeake. Most of the arguments on that long list I gave had already been advanced. And then on March 21st, 2019, this Court issued its summary judgment ruling.

Now, you can scour every document filed before that point and pour over the transcript of the oral argument and you'll find nary a mention of gestio law. The law that Chesapeake now says is settled, obvious, how did you miss it, Judge, Chesapeake did not articulate for two years, six months, and 22 days. What could explain -- what's that, Your Honor?

THE COURT: That's accurate.

MR. MARTIN: What could explain a delay of this magnitude for an obvious settled point of law?

One answer is Chesapeake just didn't want to put forth this argument. And we'll get to that. An implausible answer, I think, is that Professor Ottinger and his team just didn't think of it.

I've known Professor Ottinger for a very long time. I've worked against his team. And just like opposing counsel today, they are all exceptionally keen people. They are penetrating thinkers in the oil and goes context. I don't think this simply escaped them as a possibility.

So I think the first correct answer of why did this take so long is they didn't think it was a good theory. They didn't think it applied. And there's very good reason for that judgment. There's a management of affairs when someone acts

without authority, without having been charged to do so and not pursuant to a legal duty.

Now, Chesapeake has authority to act in this regard. It has statutory authority through the unitization statutes and it has executive authority by way of unit orders. Chesapeake is, in paying an unleased owner, acting pursuant to a legal duty. It's not a perfect fit. And there's very good reason to think that the whole suite of rights and obligations from gestor law cannot be imported here. It just doesn't make sense because of the differences.

Now, opposing counsel got into quasi-contract, and we have never disputed that what's going on here is quasi-contractual in nature for exactly the reasons she put forward and I think you noted as well. It has to be because there's no contract.

In Civil Code Article 1757, there's only two sources of obligations, contract and quasi-contract. Since we all agree there's no contract, it must be quasi-contract. And no question some courts have said insofar as the operator does this, it's kind of like negotiorum gestio, but that's not reason to think that every piece of gestio law is imported into the unitization statutes.

And that brings me to my second answer of why Chesapeake delayed so long in advancing its obvious settled theory of law. It's that Chesapeake understood that advancing

gestio would be jumping out of the frying pan and into the fire. They did not want the whole suite of rights and obligations from the gestor articles to be imported into the unitization statutes. They did not want that because that held many negative consequences that perhaps some of the other theories did not hold.

And I may just focus on the first one of these, but a gestor owes a fiduciary duty to the managed party. So if Chesapeake, in February of 2018, said we're gestors, then automatically Chesapeake becomes a fiduciary to every unleased owner in a Chesapeake-operated unit in this state and it did not want to take on the additional liability entailed by that duty. As but one example, Chesapeake, in acting as a fiduciary, would have a duty of candor and scrupulous fair dealing with unleased owners.

Now, as we know, Chesapeake intentionally concealed the existence of post-production deductions from unleased owners. It did not provide these deductions on the quarterly statements sent to unleased owners and it only began doing so after this Court issued its ruling in March of 2019. It got caught with its hand in the cookie jar.

Chesapeake knew it couldn't meet a duty of candor, of fair dealing, because it had concealed so much of this. Chesapeake did not want to take on the additional liability in 2018 of being on the hook for breach of fiduciary duty and all

the damages that might entail. So they held it in their back pocket until you rejected every other theory they advanced and they had to come up with something new. They made a calculated --

THE COURT: Mr. Martin, let me interrupt you.

MR. MARTIN: Yes, sir.

THE COURT: One of the requests in the opposition brief filed on behalf of the plaintiffs contemplated the what if the Court reconsidered and agreed gestor law applied. Then if I granted leave to amend, what do you think your amendment would look like? Am I beginning to hear one allegation or the other of the failure of Chesapeake to comply with its fiduciary duties to unleased mineral owners?

MR. MARTIN: Yes, Your Honor. That's exactly it.

This is if you adopt their theory, this is what happens, these are the consequences, and those consequences are exactly why Chesapeake did not advance the argument earlier, but when you ruled against all the other arguments, they made the calculated risk of let's advance it now knowing it would look pretty insincere if we've waited two and a half plus years to advance it knowing that it held all of these negative consequences because it thought that it could maybe push those off down the road. They had to jump out of the frying pan. They may land in the fire, but they'll figure out how to get out of the fire later because Chesapeake -- there's many attorneys on

this hearing that represent operators. None of them want an operator to be on the hook for a breach of a fiduciary duty to unleased owners. None of them wants a gestor, an operator, to have to wait for the directions from every unleased owner in Louisiana. None of them want the duty to be acting solely on the behalf of unleased owners in dealing with their share of production because then they're not a gestor if they act contrary in any way. This is in contrast to what you see in a lease context where the lessee, under a lease, only has to act for the mutual benefit of the two parties, the lessor and the lessee. It can balance.

But there's no mutual benefit here. There's no balancing contemplated in gestor, period. And a party is not a gestor, and, thus, would not be entitled to all of the provisions of 2292, et seq., if it failed to act as a gestor. It becomes a messy fact question. Chesapeake did not want, in February of 2018, to be liable for mismanagement of the affairs of unleased owners.

Chesapeake, as we all know, is in bankruptcy right now because it mismanaged its own affairs. What chance does it have of escaping mismanagement of unleased owners' affairs whose fates are kind of tied to Chesapeake's ability to make good decisions?

And then finally -- and I think this is a big one -- a gestor owes the managed party a proportionate share of profits obtained by way of management. Chesapeake in 2018 was aware of

this. They knew this was encompassed by the gestor theory and didn't want to advance it because they did not want to have to share all of the profits in a proportionate amount with unleased owners across Louisiana.

And to the extent Chesapeake is going to argue against this, I expect what they're going to say is don't worry about this right now, Your Honor. Don't even think about it. It's as we said in the *Self* matter, don't pay any attention to the man behind the green curtain. Worry about it later when it's before you when they do amend. But they are asking you to consider all the consequences of ruling a certain way here, so it seems to be on the table.

If you rule the way Chesapeake is asking you to rule, you're going to be tasked with being the philosopher king who has to decide how all of these play out in the unleased owner and operator context. I have no doubt that you could be a very capable philosopher king, but that's not the Court's institutional role. The Court's institutional role is to apply the law.

I end with something that came up in the same amicus brief that I referenced earlier and in the 12(b)(6) motion in the class action, and it's this: Chesapeake in both documents says -- or Chesapeake's counsel says that this Court turned Louisiana law on its head in March of 2019 when it ruled that the law is what it looks like it is. That's a pretty hyperbolic statement

it seems. So I'll answer it with my own hyperbole, which is this: Chesapeake's argument turns the very notion of law on its head. The most basic function of written law is to tell the citizens subject to that law what their rights and obligations are.

Chesapeake's contention right now really is 30:10(A)(3) does not tell an unleased owner anything, that because there's not an express exclusion of Article 2297 within Section (A)(3), it applies, and you should have known this, guys. All you unleased owners out there, you should have been pouring over your Civil Code. Yes. It did take Chesapeake two and a half years to mention it, but you guys should have known it, and that just strikes me as extraordinarily implausible.

And what comes next after all of this is if you adopt the gestor theory and you have to parse through all of this stuff, Chesapeake is going to switch from having this very flexible view of statutory interpretation to being Justice Scalia. Well, the text doesn't say we have to share profits. Yeah. But there's no express exclusion either. And that's the standard Chesapeake's counsel just told you, that all of these rules are applicable unless expressly excluded, and we don't have that here.

And so we can already foresee what happens in the next stage, and that's why I'm saying that if opposing counsel has rebuttal, she'll probably tell you to punt. Don't worry about

that right now, Your Honor. But if that is the case, if all of these other rules do apply by default except where expressly excluded, that's on the table.

So Chesapeake's argument is that the one statute in Louisiana that appears to address this question does no such thing. It's, as I said, an elaborate postmodern prank and the real law is somewhere else. (A)(3) is a red herring. The real law is someplace else and Chesapeake will find it for you. Chesapeake's argument is the law is not what it says it is. It's what Chesapeake says it is.

And in support of this claim, what Chesapeake has offered you is this tangled knot of arguments that, again, you could take many, many hours trying to disentangle and figure out what's actually still being argued, but what I think this Court saw in March of 2019 is what Alexander saw when he came upon the Gordian knot, which is you don't try to untie the knot. You cut the rope before the knot. I believe that's what this Court did in 2019. That's what we're asking this Court to do again today.

Chesapeake has offered a number of arguments, some old, some new. Maybe there's more on the horizon. This Court determined you don't need to take the first step away. You do not need to consider all of these other areas of law if "proceeds" means proceeds.

THE COURT: So turning Louisiana law on its head, is that the effect of adopting the negotiorum gestor theory by

suddenly holding all well operators to be fiduciaries with respect to unleased mineral owners?

MR. MARTIN: That would seem to turn Louisiana law on its head. And I suspect if we amend it to say you've breached your fiduciary duty, they will immediately reply there is no fiduciary duty. They're going to shift in between being strict textualists to be look at everything, Your Honor. Look at the wider context. It's just a game to get a result.

It's like I said earlier. There's no theoretical consistency, but this theoretical consistency is not the point. The point is to get out of the fire right now -- or out of the frying pan, get into the fire, and then figure it out later.

THE COURT: But the net effect by operation of law under the Civil Code for that kind of quasi-contractual relationship converts it from an ordinary type of duty to an extraordinary management duty?

MR. MARTIN: Yes, Your Honor.

And I think that explains why they didn't advance the argument earlier, that they did not want to take on extraordinary duties. They wanted it to be a pretty simple, statutorily-created relationship, but, again, I think they were left with no other choice but to throw all their cards on the table after the summary judgment ruling, which is why they waited.

THE COURT: All right. Anything further?

MR. MARTIN: I have nothing further, Your Honor.

THE COURT: All right. Ms. Duarte.

MS. DUARTE: I'll be very quick.

So I offered the Court a very streamlined, very direct roadmap of Chesapeake's position and how the law requires this Court to go on a step-by-step basis in making its decision, and what you were just offered by plaintiffs' counsel was an attack on Chesapeake, an attack on Chesapeake's lawyers. There were some conspiracy theories in there on why this argument didn't come in before. There was a bunch of totally irrelevant stuff that's not before the Court at this stage. And what you didn't hear was any attempt to talk about the actual issues, to talk about the rules --

THE COURT: Let me stop you right there.

MS. DUARTE: Okay.

THE COURT: Suppose in footnote 1, if I accept the negotiorum gestor theory and hold that the operator is in fact part of that, then am I dropping a footnote that says under the Civil Code, the duties of an NG become that of a fiduciary, period?

MS. DUARTE: No. I don't think you are, and that's not an issue that's before you right now.

The statute that we have given the Court as providing for the right of reimbursement gives the standard of care for the negotiorum gestor as well. The manager is then taken as a

prudent administrator. Okay? We'll have to talk about what that is and what it means, but it doesn't mean you're opening --

THE COURT: A negotiorum gestor set of duties now is different in the oil and gas operator context than in the Civil Code context?

MS. DUARTE: I'm not saying that. I'm saying I gave you the article from the Civil Code. The prudent administrator standard would apply. So I'm saying that it does apply.

THE COURT: Why doesn't fiduciary duty provided by the Civil Code apply?

MS. DUARTE: I'm sorry. I didn't hear that, Your Honor.

THE COURT: Why does not the fiduciary duty in the Civil Code for a gestor apply?

MS. DUARTE: Because the word "fiduciary" doesn't appear in the Civil Code, Your Honor. The words "prudent administrator" does. The word "fiduciary" comes from Mr. Martin. I haven't read the cases that he cited exactly to be able to distinguish them, but it's not in the Civil Code.

And I will tell you this, another thing. He mentioned Article 2294 saying that the manager must wait for the directions of the owner. Also not true. If you actually look at Article 2294, it says the manager is bound, when the circumstances so warrant, to give notice to the owner that he's undertaken the management and to wait for the directions unless there's

immediate danger.

Here the unleased mineral owner is getting noticed every time he gets a check that its interests are being managed, okay, and the circumstances so warrant. It doesn't say that in every case we have to wait for their direction. So I totally disagree with the enumerated items applicable to the duties that would be ours as a negotiorum gestor, but he's right when he says that that's not for the Court right now. We are not saying that the only negotiorum gestor duty that applies is the right of reimbursement. We're not saying that. Okay? In the same statute it talks about prudent administrator. We're with you on that. We're not saying it's different in the oil and gas context, but the point that I think the Court needs to hold them to is they didn't address the legal analysis to get there at all. Okay?

I put up fireworks around "severance taxes." Fireworks. I said roadblock. How do you get around this? How can analytically you say that severance taxes be deducted, but these can't? And there were crickets. The words "severance tax" didn't come up at all in the argument.

Now, I never once meant to attack the Court for not finding negotiorum gestio. It would have been much better if it had been raised earlier. That's not the Court's fault, but the Fifth Circuit isn't going to care whether it was two years or two minutes after this case was instituted that this theory was

articulated if it's the right theory, if it's the right answer when you apply the rules of statutory construction correctly in the order they're supposed to be applied. They did not offer you anything to refute what we went through painstakingly in our argument.

So in that respect, I think we're no further along than where we were when I stopped the first time. We've offered you the roadmap. They haven't refuted the roadmap. So I can't even talk about anything else on that since I've already addressed everything and there's nothing to counter to that.

You're not turning Louisiana law on its head if you adopt negotiorum gestio. You're following the Supreme Court's decision in *Wells vs. Zadeck*. You're following the First Circuit and the Third Circuit in the *Taylor* cases. Okay? This is only saying that that doesn't apply simply in a prescription context. That's all you're doing that's new. And Judge Foote's already done that in *J&L*. So this is not some great new thing. It will be a big difference if what you're saying is negotiorum gestors are the only category of folks in Louisiana law that don't get reimbursement for their management expenses.

Unless the Court has any other questions, I don't have anything else.

THE COURT: I do not. I may set some additional briefing requirements following today and we will notify everyone in due course.

I want to thank everybody for being so well-prepared and for actually finishing this before lunch. I'm stunned. But it's complex and it's an important question.

The matter has been moved for reconsideration by the Court with a whole bunch of additional stuff added to it, and we will thread through that and see if it's intertwined or separate from and what to be done with it.

Great arguments presented by both sides and stay tuned for that briefing schedule.

MR. MARTIN: Thank you, Your Honor.

MS. DUARTE: Thank you, Your Honor.

THE COURT: Thank you.

Ms. Duarte, may I ask you a quick question?

MS. DUARTE: I'm kind of scared, but, yes, sir.

THE COURT: Is that a radiant steam heater system under the window where you are?

MS. DUARTE: It's actually a virtual background. You don't want to know what's behind me in the room that I'm actually in, Your Honor.

THE COURT: I was curious because, boy, that's a heck of a deal to leave a steam radiant heater. You don't want to see my background either. I just look like I'm in the courtroom. The Grand Jury is occupying it today.

MS. DUARTE: You do.

THE COURT: But we have the visual imagery of that

which we choose on this Zoom platform.

Thank you, everyone.

You look like you're in a real room with books behind you.

MR. MARTIN: I was going to say Ms. Duarte has been knocking her own ability with technology. This is just our conference room. I don't know how to make a virtual background. I'm not sure what I'm doing wrong.

THE COURT: Yeah. You've got to have a 12-year-old or a network engineer. That's all there is to it.

Thank you, again. Bye-bye, everyone.

MR. MARTIN: Thank you, Your Honor.

MS. DUARTE: Thank you. Bye-bye.

(Proceedings adjourned.)

– – –

Certificate

I hereby certify this 5th day of August, 2021, that the foregoing is, to the best of my ability and understanding, a true and correct transcript from the record of proceedings in the above-entitled matter.

/s/ LaRae E. Bourque

Federal Official Court Reporter